

Internal Revenue Service

memorandum

TL-N-7860-88

CC:TL:TS/MAKEYES

date: OCT 13 1988

to: District Counsel, Los Angeles W:LA
Attn: Howard Rosenblatt

from: Assistant Chief Counsel (Tax Litigation)

subject: Scar Issue - [REDACTED]

This memorandum is in response to your request for technical advice regarding a Scar issue in the above-captioned case. We are unable to recommend that you concede or defend the statutory notice at this time since you have not been able to obtain relevant information needed to make such a determination (i.e.- the tax return and the administrative file). Once this information is obtained, we can make a determination as to whether the notice should be defended.

FACTS

The notice of deficiency was issued on [REDACTED], for the [REDACTED] year. The deficiency was \$ [REDACTED] which arose from disallowed losses from two tax shelters - [REDACTED] and [REDACTED] (Part of [REDACTED]). The deficiency notice also listed imposed additions to tax under sections 6651(a)(1), 6653(a)(1) and (2), 6659 and 6661. The notice of deficiency contained the "smoking gun language" of Scar (In order to protect the government's interest and since your original income tax return is unavailable at this time, the income tax is being assessed at the maximum tax rate of 50%).

Taxpayers did not petition the Tax Court and the notice was defaulted sometime in [REDACTED]. After collection activity began and [REDACTED] years after the issuance of the notice, the [REDACTED] requested that assessment be abated, claiming that the statutory notice was invalid under Scar v. Commissioner, 814 F.2d 1363 (9th Cir. 1987) rev'g 81 T.C. 855 (1983). Taxpayers have stated that they will bring a suit seeking injunction, declaratory relief, damages and attorneys fees if the abatement is denied.

008866

DISCUSSION

As noted previously, we are unable to make a determination as to whether this notice should be defended because: (1) the tax return has not been located; and (2) the administrative file has not been obtained. Without the tax return we are not sure whether the disallowed deductions were actually taken, or whether the amounts listed on the notice of deficiency are correct. Since the taxpayers reside in the Ninth Circuit it is important for us to ascertain whether the facts here are distinguishable from those in the Scar case.

It is our position that we do not need to have the original tax return to make a determination. Instead it is our position that we can rely on taxpayer return information found in the Service's data bases in making a determination (i.e. the transcript of account, as well as relevant K-1s). Therefore, in deciding whether to defend a Scar notice, it is important to see if we used the information we had available. Since you have not yet been able to obtain the administrative file, we do not know if a transcript of account was used (or any other relevant information) and if so, whether correct figures were taken from the transcript.

It appears from the notice of deficiency that we used the transcript of account in arriving at the figure listed on the sheet of income tax changes regarding tax shown on return. However, after reviewing the notice of deficiency it also appears that even if the transcript of account was used, we did not use all relevant information from it, and the 50 percent rate was backed into rather than reached by using all the information on the transcript. For example, the notice does not list the adjusted gross or taxable income as previously reported. It appears that 50 percent of the disallowed losses was determined, then that figure was added into the previous tax shown on the return to arrive at corrected tax. Furthermore, it appears that the 50 percent plug rate was incorrect. For [REDACTED], the correct rate for married couples filing joint returns for taxable income over 60,000 but not over 85,600 is 49 percent.

As the LGM provides, the Service will not relitigate the "determination" issue on facts not materially distinguishable from Scar. 1/ The ideal case to litigate would be one where the adjustments were correct and the rate was correct. Furthermore,

1/ LGM, TL-3, The "Determination" Requirement for Statutory Notice of Deficiency under I.R.C. § 6212(a); Scar v. Commissioner, 814 F.2d 1363 (9th Cir. 1987), rev'g 81 T.C. 855 (1983).

we would like to be able to show the transcript of account was used to make the determination of the deficiency, as compared to "backing into" the correct deficiency. Here there may be problems in that the correct rate may not have been used (although if the 49 percent is the right rate we might still defend), and it also appears from the notice that we "backed into" the determination. In this case, since petitioners defaulted, we also need to determine if petitioners can bring a refund suit or an injunction action.

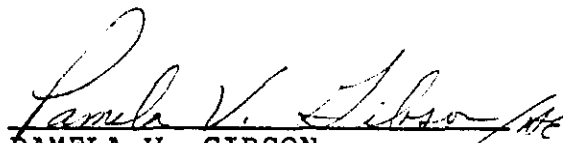
Petitioners are prohibited from bringing an injunction unless, it falls within exceptions permitted by section 7421. This case may fall within section 7421 as an exception provided for in section 6213(a). There are also certain judicial exceptions, notwithstanding section 7421 to the anti-injunction rule. One of the leading cases is Enochs v. Williams Packing and Navigation Co., 370 U.S. 1, rehearing denied, 370 U.S. 965 (1962). In that case the Supreme Court set forth a two pronged test for the issuance of an injunction: (1) the United States must be incapable of prevailing under the most favorable view of the facts; and (2) special circumstances must exist indicating that the taxpayer does not have an adequate remedy at law (e.g. a refund suit), resulting in irreparable injury. Mere hardship is simply not a ground for the issuance of an injunction. California v. Latimer, 305 U.S. 225 (1935). Later cases have followed the Enochs test. See Commissioner v. Shapiro, 424 U.S. 614 (1976); South Carolina v. Regan, 104 S. Ct. 1107 (1984). This may be the type of case that falls within the judicial exception. However, this is not intended as a full discussion on the issue. We can make a better determination once we receive additional information from you.

Before a decision on the Scar issue can be made we need to see the transcript of account and the tax return. Please forward this information when you obtain it and we will supplement our views.

Should you have any questions regarding this matter please contact Marsha Keyes, Tax Shelter Branch at Fts 566-4174.

MARLENE GROSS

By:



PAMELA V. GIBSON
Acting Chief,
Tax Shelter Branch